

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

JERRY DILLINGHAM,

Plaintiff,

v.

A. FLORES, et al.,

Defendants.

Case No. 1:20-cv-01164-HBK (PC)

ORDER TO ASSIGN A DISTRICT JUDGE

FINDINGS AND RECOMMENDATIONS TO
DISMISS ACTION WITHOUT PREJUDICE¹

14-DAY DEADLINE

Plaintiff Jerry Dillingham is a former state prisoner proceeding pro se in this civil rights action. For the reasons set forth below, the undersigned recommends that the District Court dismiss this action without prejudice for Plaintiff's failure to comply with a court order and prosecute this action.

BACKGROUND

Plaintiff initiated this action by filing a civil rights complaint under 42 U.S.C. § 1983. (Doc. No. 1, "Complaint"). On May 4, 2023, pursuant to 28 U.S.C. § 1915A the Court issued a screening order finding the Complaint failed to state a claim against any of the named Defendants. (*See generally* Doc. No. 16). The Court afforded Plaintiff three options: (1) file an

¹ This matter was referred to the undersigned pursuant to 28 U.S.C. § 636(b)(1)(B) and Local Rule 302 (E.D. Cal. 2022).

1 amended complaint; (2) file a notice that he intends to stand on his initial complaint subject to the
 2 undersigned recommending the district court dismiss for reasons stated in the May 4, 2023
 3 Screening Order; or (3) file a notice to voluntarily dismiss this action, without prejudice, under
 4 Federal Rule of Civil Procedure 41(a)(1) because no defendant had yet been served. (*Id.* at 8-9).
 5 The Court expressly warned Plaintiff that if he “fails to timely respond to this Court Order or seek
 6 an extension of time to comply” the undersigned “will recommend that the district court dismiss
 7 this case as a sanction for Plaintiff’s failure to comply with a court order and prosecute this
 8 action.” (*Id.* at 9, ¶ 2). On June 6, 2023, the Court granted Plaintiff an extension of time to
 9 respond to the Screening Order, with a final deadline of August 1, 2023. (Doc. No. 18). As of
 10 the date of this of this Findings and Recommendation, Plaintiff has failed to exercise any of the
 11 three options from the Court’s Screening Order, or request a further extension of time to comply,
 12 and the time to do so has expired.² (*See* docket.)

13 Further, considering Plaintiff’s various changes of address reflecting that he had been
 14 released from custody, (Doc. Nos. 12-15), on July 14, 2023, the Court issued an order directing
 15 Plaintiff to submit a long form IFP application documenting his continued indigency or pay the
 16 remaining filing fee consistent with the Prison Litigation Reform Act and 28 U.S.C. § 1915(b)(1).
 17 (Doc. No. 19). Plaintiff was directed to do so by August 14, 2023. (*Id.* at 3). Plaintiff was
 18 advised that failure to do so could result in dismissal for failure to prosecute and comply with a
 19 court order. (*Id.* at 4). To date, Plaintiff has neither submitted an updated IFP application nor
 20 paid the filing fee.³ (*See* docket).

21 APPLICABLE LAW AND ANALYSIS

22 A. Legal Standard

23 Federal Rule of Civil Procedure 41(b) permits the court to involuntarily dismiss an action
 24

25 ² In granting his requested extension of time, the Court advised Plaintiff that he must deliver either his
 26 amended complaint or appropriate notice to correctional officials for mailing no later than August 1, 2023.
 (Doc. No. 18 at 2). The undersigned allotted 15 days from the August 1, 2023, deadline to account for
 mailing before issuing these Findings and Recommendations.

27 ³ The Court notes that the July 14, 2023 order was returned undeliverable, (*see* docket), however several
 28 other orders sent to the same address have not been returned undeliverable, including one issued since the
 July 14, 2023 order.

1 when a litigant fails to prosecute an action or fails to comply with other Rules or with a court
 2 order. *See* Fed. R. Civ. P. 41(b); *see Applied Underwriters v. Lichtenegger*, 913 F.3d 884, 889
 3 (9th Cir. 2019) (citations omitted). Similarly, this Court’s Local Rules, which correspond with
 4 Federal Rule of Civil Procedure 11, provide, “[f]ailure of counsel or of a party to comply with . . .
 5 any order of the Court may be grounds for the imposition by the Court of any and all sanctions
 6 . . . within the inherent power of the Court.” E.D. Cal. L.R. 110. “District courts have inherent
 7 power to control their dockets” and, in exercising that power, may impose sanctions, including
 8 dismissal of an action. *Thompson v. Housing Auth., City of Los Angeles*, 782 F.2d 829, 831 (9th
 9 Cir. 1986). A court may dismiss an action based on a party’s failure to prosecute an action, obey
 10 a court order, or comply with local rules. *See, e.g., Ferdik v. Bonzelet*, 963 F.2d 1258, 1260-61
 11 (9th Cir. 1992) (dismissal for failure to comply with a court order to amend a complaint); *Malone*
 12 *v. U.S. Postal Service*, 833 F.2d 128, 130-31 (9th Cir. 1987) (dismissal for failure to comply with
 13 a court order); *Henderson v. Duncan*, 779 F.2d 1421, 1424 (9th Cir. 1986) (dismissal for failure
 14 to prosecute and to comply with local rules). In determining whether to dismiss an action, the
 15 Court must consider the following factors: (1) the public’s interest in expeditious resolution of
 16 litigation; (2) the Court’s need to manage its docket; (3) the risk of prejudice to the defendants;
 17 (4) the public policy favoring disposition of cases on their merits; and (5) the availability of less
 18 drastic sanctions. *Henderson*, 779 F.2d at 1423; *Carey v. King*, 856 F.2d 1439, 1440 (9th Cir.
 19 1988).

20 **B. Analysis**

21 After considering each of the above-stated factors, the undersigned concludes dismissal
 22 without prejudice is warranted in this case. As to the first factor, the expeditious resolution of
 23 litigation is deemed to be in the public interest, satisfying the first factor. *Yourish v. California*
 24 *Amplifier*, 191 F.3d 983, 990-91 (9th Cir. 1999).

25 Turning to the second factor, this Court’s need to efficiently manage its docket cannot be
 26 overstated. This Court has “one of the heaviest caseloads in the nation,” and due to the delay in
 27 filling judicial vacancies, which was further exacerbated by the Covid-19 pandemic, operates
 28 under a declared judicial emergency. *See* Amended Standing Order in Light of Ongoing Judicial

1 Emergency in the Eastern District of California. This Court's time is better spent on its other
2 matters than needlessly consumed managing a case with a recalcitrant litigant. The Court cannot
3 effectively manage its docket when a litigant ceases to litigate his/her case or respond to a court
4 order. Thus, the Court finds that the second factor weighs in favor of dismissal.

5 Delays inevitably have the inherent risk that evidence will become stale or witnesses'
6 memories will fade or be unavailable and can prejudice a defendant, thereby satisfying the third
7 factor. *See Sibron v. New York*, 392 U.S. 40, 57 (1968). Thus, the third factor—risk of prejudice
8 to defendant—weighs in favor of dismissal since a presumption of injury arises from the
9 unreasonable delay in prosecuting an action. *Anderson v. Air W.*, 542 F.2d 522, 524 (9th Cir.
10 1976). Because Plaintiff's inaction amounts to an unreasonable delay in prosecuting this action,
11 the third factor weighs in favor of dismissal.

12 The fourth factor usually weighs against dismissal because public policy favors the
13 disposition of cases on the merits. *Pagtalunan v. Galaza*, 291 F.3d 639, 643 (9th Cir. 2002).
14 However, "this factor lends little support to a party whose responsibility it is to move a case
15 toward disposition on the merits but whose conduct impedes progress in that direction," which is
16 the case here. *In re Phenylpropanolamine (PPA) Products Liability Litigation*, 460 F.3d 1217,
17 1228 (9th Cir. 2006) (citation omitted). Indeed, "trial courts do not have time to waste on
18 multiple failures by aspiring litigants to follow the rules and requirements of our courts."
19 *Pagtalunan*, 291 F.3d at 644 (Trott, J., concurring in affirmance of district court's involuntary
20 dismissal with prejudice of habeas petition where petitioner failed to timely respond to court
21 order and noting "the weight of the docket-managing factor depends upon the size and load of the
22 docket, and those in the best position to know what that is are our beleaguered trial judges."").
23 Further, as set forth in the Screening Order, the Court already determined that the Complaint, as
24 pled, failed to state a claim, so this factor does not weigh in favor of the Plaintiff.

25 Finally, the Court's warning to a party that failure to obey the court's order will result in
26 dismissal satisfies the "considerations of the alternatives" requirement. *Ferdik*, 963 F.2d at 1262;
27 *Malone*, 833 F.2d at 132-33; *Henderson*, 779 F.2d at 1424. The Court's May 4, 2023 Order
28 expressly warned Plaintiff that his failure to comply with the Court's order would result in a

1 recommendation for dismissal of this action. (Doc. 16 at 9). Thus, Plaintiff had adequate
2 warning that dismissal could result from his noncompliance. And the instant dismissal is a
3 dismissal *without* prejudice, which is a lesser sanction than a dismissal with prejudice, thereby
4 satisfying the fifth factor.

5 After considering the factors set forth *supra* and binding case law, the undersigned
6 recommends dismissal, without prejudice, under Fed. R. Civ. P. 41(b) and Local Rule 110.

7 Accordingly, it is **ORDERED**:

8 The Clerk of the Court randomly assign this case to a District Judge.

9 It is further **RECOMMENDED**:

10 This action be DISMISSED without prejudice for Plaintiff's failure to obey court orders
11 and failure to prosecute.

12 **NOTICE**

13 These Findings and Recommendations will be submitted to the United States District
14 Judge assigned to this case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within 14 days
15 of the date of service of these Findings and Recommendations, a party may file written objections
16 with the Court. The document should be captioned, "Objections to Magistrate Judge's Findings
17 and Recommendations." A party's failure to file objections within the specified time may result in
18 waiver of his rights on appeal. *Wilkerson v. Wheeler*, 772 F.3d 834, 839 (9th Cir. 2014) (citing
19 *Baxter v. Sullivan*, 923 F.2d 1391, 1394 (9th Cir. 1991)).

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21 Dated: August 28, 2023

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23 HELENA M. BARCH-KUCHTA
24 UNITED STATES MAGISTRATE JUDGE
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